EXPLANATORY MEMORANDUM TO

THE PROTECTED DISCLOSURES (EXTENSION OF MEANING OF WORKER) ORDER 2015

2015 No. XXXX

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends section 43K of the Employment Rights Act 1996 to bring student nurses and student midwives who have undertaken work placements, as part of a course of education or training approved by or under arrangements with the Nursing and Midwifery Council in accordance with article 15(6)(a) of the Nursing and Midwifery Order 2001, into the scope of whistleblowing protections.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Part 4A of the Employment Rights Act 1996 ("the 1996 Act") provides employment protection for workers who make certain disclosures of information.

4.2 The 1996 Act defines the categories of disclosure which qualify for protection ("qualifying disclosures", which include public interest disclosures about health or safety of an individual being endangered for example) and the circumstances in which such disclosures will be protected. To benefit from protection an individual must satisfy the definition of a worker in sections 230 or 43K of the 1996 Act.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 The Minister for Employment Relations and Consumer Affairs has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Protected Disclosures (Extension of Meaning of Worker) Order 2015 are compatible with the Convention rights.

7. Policy background

7.1 The Government Response to the Call for Evidence on the Whistleblowing Framework set out 9 recommendations as a package of measures to support the important role of whistleblowing. This Order implements one of the commitments from the Government Response to bring student nurses within the definition of a worker under section 43K of the 1996 Act, so that whistleblowing protections are extended to them when they make a public interest disclosure.

7.2 Currently student nurses and student midwives are not covered by the whistleblowing framework if they made a public interest disclosure. Although section 43(1)(d) of the 1996 Act provides that those on work experience can benefit from whistleblowing protections, subsection 43(1)(d)(ii) excludes students who are on work experience as part of any course run by an educational establishment.

7.3 It is not the intention of this legislative change to extend other employment protections to student nurses and student midwives. It is also not the intention to include other students. BIS would need to carry out more research to understand whether other student groups would be in a similar position to student nurses.

8. Consultation outcome

8.1 The Department consulted extensively on whistleblowing in the form of a call for evidence in July 2013 to identify whether the legislation required further updating. The Government issued its response to the call for evidence on 25 June 2014.

8.2 The findings concluded that there was a clear case for student nurses to be brought into scope of the legislation because of the employment-like relationship between the student nurse and the healthcare provider where they are carrying out their work experience. Working with the Royal College of Nursing and the Nursing and Midwifery Council, the Department accepted that student midwives belong to the same professional group as student nurses.

8.3 It was agreed that student nurses and student midwives are in exactly the same position as any other nurse or midwife to witness malpractice and therefore should be able to report concerns without feeling their training or future career could be threatened if they do. A dismissal or mistreatment could jeopardise a student nurse's or student midwife's career and earnings.

8.4 The changes that were announced in the Government response include: improved guidance on how whistleblowing works for employees; a new best practice guide to whistleblowing policies for employers; reviewing the effectiveness of the current process for referring a case to the appropriate regulator; the introduction of a duty on prescribed persons to report annually on the number of cases they have received and whether these

have been investigated; updating the prescribed persons list; and giving relevant groups (e.g. student nurses) whistleblowing protections.

8.5 This Order only implements the change to student nurses and student midwives.

9. Guidance

9.1 The Department will use appropriate communication channels and press avenues to publicise this change.

10. Impact

10.1 The impact on business, charities or voluntary bodies is considered to be low. This view was confirmed by the Regulatory Policy Committee. This is because it will only affect employers that take on student nurses or student midwives. In such cases, the direct costs will involve a familiarisation cost to understand how the existing legislation extends to student nurses and student midwives. The Department has assessed the impact to be predominantly on NHS employers. However there will be some impact on businesses, where student nurses and student midwives are placed with independent healthcare providers. There are 20,000 student nurses and student midwives and therefore a conservative estimate of impact has been calculated at £27,430.

10.2 The impact on the public sector is also low because NHS employers are already familiar with the whistleblowing legislation. As stated above, the Department has assessed the impact to be predominantly on NHS employers. The cost to all employers is calculated as a whole (above).

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 There have been calls for other groups such as other students, volunteers and foster carers to be brought into the scope of the whistleblowing framework. The Department will continue to review this area with the view to consulting if further changes are considered necessary.

13. Contact

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